

REPLY BRIEF OF ELTRA CORPORATION, APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 77-1188

ELTRA CORPORATION,
Appellant

v.

BARBARA A. RINGER,
Appellee

Appeal from the United States District Court for the
Eastern District of Virginia, Alexandria Division

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APR 21 1977

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with Congressional acquiescence and whether such practice is legally relevant and within the statutory and constitutional authority of the Register of Copyrights.

II

THE ORION TYPEFACE DESIGN IS REGISTRABLE AS A WORK OF ART

The Court below made specific findings that the Plaintiff's original typeface design entitled ORION is a work of art based on the stipulated facts of record. A. 57, 59. The Register's brief is a studied attempt in avoiding this finding. Specifically, the Register attempts to evade the holding that the ORION typeface design is a work of art by urging that the Court's ruling thereon is "immaterial," "dicta," or simply "error," Reg. Br., p. 41. A brief examination of each of these contentions exposes their fallacies.

Since Eltra sought to register its "ORION" design on Copyright Office Form "G", the form appropriate for a "work of art" under 17 U.S.C. §5(g) (A. 8-9), nothing could be more material or relevant to the core issue of the registrability of this design than a determination that it was a "work of art." The materiality and relevancy of the finding that the ORION typeface design is a work of art is further highlighted by the fact that the then Chief Examiner of the Copyright Division, Richard E. Glasgow, who made the final rejection of the application to register the ORION typeface design, admitted that the claim of copyright in the design

would be registrable if it were a work of art, Glasgow Dep., A. 78.

The Register's characterization as "dicta" of the Court's finding that the ORION design is a work of art is nothing less than a transparent attempt to minimize the importance of the finding.^{2/} If the lower court's decision contains any dicta, it is its finding of a long standing practice having Congressional acquiescence, a finding that has no relevance in view of the statutory directive that works of art shall be registered.

The Register's labelling as "error" the Court's finding that the ORION typeface design is a work of art stretches credulity. The "error" asserted is that the framers of the Copyright Office regulations did not consider typeface designs as approaching the historical and ordinary conception of the term "art" (Reg. Br., p. 7) and that the pleasing and/or attractive nature of the typeface design and the amount of time or money spent in its creation has no relevancy to the case (Reg. Br., p. 4), citing L. Batlin and Son, Inc. v. Snyder, 187 U.S.P.Q. 721, 725, n. 91, reversed en banc on other grounds, 536 F.2d 486 (2d Cir. 1976); and Vacheron & Constantin-Le Coultre Watches, Inc. v. Benrus Watch Co., 155 F.Supp. 932 (S.D.N.Y.), modified 260 F.2d 637 (2d Cir. 1958). Neither basis withstands the test of scrutiny.

^{2/} The Register's rejection cited §202.1(a) and §202.10(c) of the Copyright Office regulations, although the latter has apparently been abandoned. Reg. Br., p. 10. Moreover, since the District Court explicitly declared that the Register's interpretation "as exemplified" in these regulations that Eltra's typeface design was not a "work of art" is "erroneous" (A. 59), the legal efficacy of the regulations is impaired, if not destroyed.

The Register's "assumption" that the framers of the regulations did not consider typeface designs as "art" flies in the face of the ordinary dictionary definition^{3/} of "art" and the modest legal standards of what constitutes a work of art, as set forth in Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 249 (1903), Mazer v. Stein, 347 U.S. 201 (1954) and Esquire v. Ringer, 414 F.Supp. 939 (DDC 1976) [See Eltra's Br., p. 6-10). Further, it conflicts with common sense!

The "regulations" of the framers to which the Register alludes were the 1910 Copyright Office regulations. These did not state that typeface designs were non-registrable either generally or as works of art in Class "G." They merely stated that the Copyright Office would not make registration for the designs as "prints and pictorial illustrations" in Class "K." Eltra's Br., p. 11. The records show, and the Register concedes, that even this limitation was deleted by amendment in 1914. From 1914 to at least 1956, the regulations were utterly devoid of any restriction on the registrability of typeface designs. Thus, if there is any "assuming" to do, it is more reasonable to assume that the

3/ The Register is simply not correct in stating at page five of her brief that in L. Batlin and Son, Inc. v. Snyder, 187 U.S.P.Q. 721, 725 n. 91, reversed en banc on other grounds, 536 F.2d 486 (2d Cir. 1976) the Second Circuit "repudiated" the dictionary definition of "art" as a meaningful statutory standard. Furthermore, in Norwegian Nitrogen Products Co. v. U.S., 288 U.S. 294 (1933) the court in fact recommended recourse to the dictionary in determining the meaning of "hearing."

limited restriction on registering typeface designs from 1910 to 1914 was unsupportable under the Statute, and hence eliminated.

The Register's argument that the attractiveness or pleasing nature of the ORION typeface design and the amount of time or money spent in its creation has no relevancy ignores Judge Gesell's holding in Esquire v. Ringer, supra, that an outdoor lighting fixture was properly copyrightable because its design was attractive and pleasing.

The Register misplaces her reliance on the Batlin and Vacheron & Constantin-Le Coultre Watches, Inc. cases.^{4/}

Batlin was an action for copyright infringement of an "Uncle Sam" coin bank. It did not involve registrability of a typeface design.^{5/} The Court found that the exact duplica-

4/ L. Batlin and Son, Inc. v. Snyder, supra; Vacheron & Constantin-Le Coultre Watches, Inc. v. Benrus Watch Co., supra.

5/ There is a distinction between "registrability" and "copyrightability" under the 1909 Copyright Statute. "Registrability" relates to mere procedural compliance with the requirements of the Statute, whereas "copyrightability" can only be determined by a court after proof of originality, authorship, proprietorship, and the other elements necessary to a valid copyright. The Court below correctly grasps the distinction in noting that, "***the Plaintiff's insistence that the case be viewed as a question of registrability rather than copyrightability may be more than just semantics, leaving to the courts in infringement cases such as Mazer the ultimate decision whether the right to a copyright exists. This is appropriate, since no attempt is made to independently search each attempted registration to determine whether it is original, i.e., created without copying." A. 57.

tion of a simple bank in a different size lacked the necessary originality or substantiality of authorship for a valid copyright. In contrast, Eltra's claim of copyright here, which the Register has wholly ignored in her brief, is based on "uncontroverted facts that Eltra's 'ORION' typeface design incorporates new design elements and existing design elements in a new arrangement, thus creating a typeface design that is substantially different from prior typeface designs." Findings 7 and 11, A. 52. Thus, the present facts are clearly distinguishable from those in the Batlin case since it is admitted that Eltra's design has the necessary ingredients of originality of authorship, which were missing in the Batlin case.

The Vacheron case involved a wristwatch, as opposed to a typeface design. As in Batlin, the lower court in Vacheron found no originality. Moreover, the court's statement on whether a wristwatch is a "work of art" under the Copyright Statute offers little solace to the Register, who neglected to advise this Court that the Appellate Court in Vacheron modified the lower court's decision by assuming that the watch was a "work of art":

"We do not think it necessary to decide whether Plaintiff's watch was copyrightable under Sec. 5(g) Title 17 U.S.C. which allows the copyright of 'works of art'; models or designs for works of art; arguendo, we will assume that it was." Id., at p. 639. (emphasis added)

error, particularly where the only independent interpretation by the Court below was that the design was a "work of art" under the Statute. That finding should have been the beginning and the end of the case. No more was required for registration purposes. All that the Court held on the issue of long standing practice was truly irrelevant and should not have acted as a bar to registration.

Of equal importance is the fact that the record is void of any proof of a long standing, well-publicized practice of refusing registration of typeface design. The Copyright Office, with its vast resources and voluminous unpublished files, has found only four rejected applications for typeface designs--the same four submitted in the proceedings below. A. 208, 211, 255 and 228. It ignores the fact that the "record" before the Court shows a preponderance of 18 registrations of typeface design works, in contrast to the four rejected applications. See Eltra's Br., p. 13-16. In attempting to distinguish the first two registrations, the Register argues that "these registrations were made where the deposit copy contains sufficient literary expression in the form of text as, for instance, might descriptively accompany a sample brochure or the like." Reg. Br., p. 30. The statement is both inaccurate and incredulous.

The rejected applications and the registrations made during the period from 1929 to 1931 were submitted on the

same copyright application Form "A," a form appropriate for booklets and brochures, so there was nothing in the form to distinguish the rejected from the registered material. The Register's statement is incredulous in view of the fact that she is able now to state why the registrations were made, even though the Assistant Register at the time the registrations issued admitted that he was unable to explain why some were registered and others were rejected because the copyright deposits for the registered works were not available for examination or comparison.^{7/} Restated, the Copyright Office knows no more today than it did in 1930 whether the early registrations (A. 208, 211, 225, 228; Eltra's Exhibits A1-A4) contained "sufficient literary expression in the form of text" or anything different from what was rejected.^{8/} A. 196, 215.

^{7/} The exact language in the Assistant Register's letter of March 19, 1930 (A. 204) is: "The copies in these cases were returned to the claimant of copyright, as provided for in the law, so that we do not have them for purposes of comparison, but our impression would be that no question was raised regarding the applications because the copies appeared to be reasonably classifiable as books in the ordinary sense without regard to any question of protection for the style of typography." (emphasis added)

^{8/} The two 1931 registrations are subject to the same conjecture without the benefit of the earlier 1930 letter from the Copyright Office stating that the copyright deposits had also been returned.

Turning to the five registrations of typeface design material made between 1939 and 1968 (Eltra's Br., Exhibits B1-B5), the Register's strained explanation in her brief finally gives way to the implication that these registrations were issued in error. See footnote in Reg. Br., at 35. If "in error," when was there supposed to have been a Copyright Office practice of refusing registrations, where only four refusals were bunched between 1930 and 1941, but at least nine registrations were made between 1929 and 1968? If any error was committed, it was in refusing registration of some of the past applications for typeface design, including Eltra's design in this case.

It is curious that both Eltra and the Register rely upon the Alphatype registrations in support of their respective positions. A. 156-173. The Register claims that the Alphatype registrations demonstrate Eltra's error in asserting that the registrations relate to typeface designs. Reg. Br. 31. The Court is urged to review the Alphatype registrations for what they are worth. It will be noted that there is no limitation of any claim of copyright appearing on the certificates of registration, even though line 7 on each application is an appropriate place for such a limitation. Also, Alphatype's attorney explicitly stated in his July 31, 1975 letter to the Copyright Office that he was not disclaiming copyright on the typeface or type font designs:

to any determination of Eltra's right in 1974 to registration under the 1909 Statute.^{10/}

Assuming, arguendo, that Congress was somehow presumed to know that the Copyright Office had an administrative practice of denying typeface designs, at best, it was limited to a Congressional awareness prior to 1925, since there is no evidence of any subsequent bills or testimony relating to typeface designs from 1924 to 1975. See Eltra's Br., Ex. C. Thus, there was no Congressional awareness, much less acquiescence, of any Copyright Office practice regarding refusal of registration of typeface designs for 51 years. In any event, inaction by Congress is irrelevant to a proper determination of this case, which must be made on the basis of the Statute, and not some Congressional inaction or alleged acquiescence.^{11/}

^{10/} If the 1975 hearings had indicated that typeface designs were clearly to be registrable under the new statute, the Copyright Office would presumably have argued the other side of the coin that such was evidence that typeface had not been previously copyrightable.

^{11/} The Register's respect for the relevance of Congressional acquiescence is exhibited by the statement ". . . This case begins and should end with the Court's determination as to whether Eltra's typeface design is copyrightable subject matter." Reg. Br. 49. The Register is saying that if the typeface design is copyrightable subject matter, registration should be made, regardless of Congressional acquiescence. Indeed, the Register was not inhibited by any Congressional acquiescence when it changed its regulations to permit the registration of copyright in textile fabrics and jewelry designs, notwithstanding its refusal of such registration from 1909 to 1948 and notwithstanding Congressional failure to sanction such registration, even after hearings. See Eltra's Br. 22, note 15.

V

REGISTER'S LACK OF STATUTORY AND CONSTITUTIONAL
AUTHORITY FOR REFUSING TO REGISTER THE ORION
TYPEFACE DESIGN

By semantic sleight of hand, the Register argues that she has broad discretion and authority under the Statute to justify her actions in this case, but, in the context of the constitutional issue, she claims to have exercised virtually no authority, but merely carried out the mandate of the Librarian of Congress in following Copyright Office regulations approved by the Librarian.^{12/} Reg. Br. 61.

The inconsistency in the arguments between the Register's claim of broad statutory authority and her narrow constitutional authority is compounded by misconceptions and characterizations of prior judicial decisions. Illustratively, the Bailie and Hoffenberg cases are cited for the proposition that the authority of the Register to refuse registration was "expressly challenged" and "thoroughly examined by the parties and argued to the Court."^{13/} Reg. Br. 56. There

^{12/} The Register states that she "does refuse registrations of subject matter clearly outside the provisions of the Act. . . ." But this case is concerned with the propriety of the Register refusing registrations not clearly outside the provisions of the Statute. Since the Court found that Eltra's design was a "work of art," an explicit category under 17 U.S.C. §5(g) the Register patently exceeded the limits of her authority by refusing registration of subject matter within the very terms of the Statute.

^{13/} The limited remarks on the Register's discretion in both cases was dicta. In Bailie, a cardboard star was held not to be a work of art, and in Hoffenberg, the Court held that an American edition of a work previously published abroad in the English language was not entitled to registration without being previously registered for ad interim copyright.

is no evidence in either of these decisions or in any of the material submitted in this case that the Register's authority was "expressly challenged" or "thoroughly examined by the parties and argued to the Court" in Bailie and Hoffenberg. In fact, any such contention is in conflict with the Register's own statement:

"The copyright registration procedure in the Library of Congress has functioned well for 106 years, unchallenged by anyone in the numerous copyright cases litigated." (emphasis added) Reg. Br. 66.

To show that she has acted within her statutory authority, the Register assumes that the prohibition against her exercise of "judicial functions" under the 1909 Act means only that she can make no determination on the credibility of statements made in the application, conflicting claims among multiple claimants, or issues of infringement.^{14/} Since credibility of witnesses, conflicting claims of ownership and copyright infringement claims are so clearly outside the ambit of the Register's duties under the 1909 Statute, it is misleading for the Register to claim that the 1909 House Committee report admonishes the Copyright Office against performing such unlikely activities as "judicial functions." Rather, as indicated by the many statements by

^{14/} The 1909 House Committee Report stated that the rules and regulations function of the Copyright Office did not confer upon the Register any "judicial functions." See Eltra's Br. 26.

witnesses in the pre-1909 legislative proceedings,^{15/} the prohibition was aimed against any Copyright Office effort to determine copyrightability so as to facilitate registration, since it was recognized that no redress for infringement was possible without a certificate of registration.

^{15/} The Register apparently feels that any direct and explicit statements of witnesses in the pre-1909 legislative proceedings are irrelevant to an interpretation of the 1909 Statute, but inferences drawn from witnesses after the Act should be so compelling. Nevertheless, even Herbert Putnam, then Librarian of Congress during the pre-1909 proceedings, acknowledged that the Copyright Office unlike the Patent Office had no "adjudicative" function of determining registrability. See Eltra's Br. 23, note 16. The limited nature of the Register's function is illustrated by the following statements in 1912 of Congressman Frank D. Currier, Chairman of the House Committee on Patents:

"It was the evident purpose of the committee when this copyright bill was put in to take in what was simply a ministerial office.

* * *

We cannot allow you (the Register of Copyrights) to determine what is a copyright.

* * *

The Copyright Office has not a force of examiners, and they do not know a damn thing about it (registration). You would be certifying to something you do not know anything more about than I do.

* * *

I have not any objection except for the attempt of the Copyright Office to pass on the question of law.

* * *

You have not an examining force as they have at the Patent Office?

To this last, Register Solberg stated: "No; and we do not attempt to make an examination, which seems to be a most serious defect in the law as it stands." A. 135-138.

Vacheron & Constantin-Le Coultre Watches, Inc., supra; 17
U.S.C. §13.

The view that the Copyright Office was substantially a depository for the registration of claims of copyright^{16/} was also supported by Arthur Weil, the major commentator at the time of the passage of the 1909 Act, (Eltra's Br., 27), and most recently by Judge Gesell in Esquire v. Ringer, 414 F.Supp. 939 (DDC 1976).

The arguments employed by the Register to avoid the rocks and shoals of unconstitutionality are inconsistent. Thus, after stating that "under the 1909 Act. . .the Copyright Office would determine (by regulation) whether the subject matter of an application was within the province of copyright" (Reg. Br., 57), the Register states inconsistently:

"To the extent that the Register herself can be said to have exercised authority in this case, it consists of her refraining from recommending a change in the regulations to permit registration of typeface designs." Id. at 59.

In other words, the Register claims authority to adopt a regulation to deny registration, but denies any authority to amend it.

^{16/} In the February 5, 1907 Committee Report (S.Rep 6187) on a bill substantially in the same form as the Act of 1909, the Committee stated: "What the claimant of copyright does in the Copyright Office is merely to file a claim; and what the Office does for him is to merely record this claim. It does not adjudicate it." Brylawski and Goldman, supra, at Q-5.

The Register also states, "(t)he essential authority exercised in this case was the promulgation of the regulations under which the plaintiff's claims were rejected. The rejection was necessarily mandated by the very terms of the Regulations. . ." Id. at 61. The applicable regulation--namely, §202.1(a)--does not "mandate" rejection of all typeface designs, as claimed by the Register, but only those which are "mere variations" under the literal language of this regulation. A. 108. The only reasonable construction of this regulation is that substantial variations of typeface designs are registrable. While the Copyright Office made no finding whether the variations of the ORION typeface design were, indeed, "substantial," the Court below did so find. See Findings 7 and 14, A. 52-54. Accordingly, Regulation 202.1(a) does not "mandate" a rejection of the original ORION typeface design, but rather mandates its registration since the variations therein are "substantial."

It is also significant that the actual refusal of registration of the claim of copyright in the ORION typeface design was not pursuant to the regulations referred to in the letter of rejection, but rather on the explicit finding that the design was not a "work of art,"--a finding which was not necessary if regulation 202.1(a) was being applied without the exercise of discretion. See Glasgow's rejection letter, A. 10-11.

In addition, from 1914 to 1956, there was no Copyright Office regulation relating to typeface designs. Therefore, in the absence of such a regulation, the Copyright Office should have registered typeface designs, rather than denied such registration.^{17/} Manifestly, during this period, the Register acted unconstitutionally in exercising broad discretion to reject claims of copyright on typeface designs when there was no regulation relating thereto. Eltra's Br. 28-33.

The Register defends her exercise of broad executive functions as constitutional on the grounds that (1) she exercises no "executive power" and (2) she can exercise executive power because she was appointed by the Librarian of Congress, who qualifies as a "head of a department" within the meaning of the Appointments Clause of the Constitution.

The rationale that the Register exercises no "executive power" is based on two faulty assumptions. First, the Register assumes that, because the promulgation of the regulations was with the approval of the Librarian of Congress,^{18/} it is

^{17/} All of the rejections referred to by the Register occurred during this period. See Eltra's Br. at 12.

^{18/} The Librarian has nothing to do with the administration of the Copyright Law. His power to "approve" Copyright Office regulations (17 U.S.C. §207) is on the theory that the regulations are merely housekeeping ones which relate to the flow of copyright deposits into the Library and other matters in which the Library would have a direct interest. The Librarian's "approval" power is more ceremonial than real, as exemplified by the fact that the Librarian has taken no active role in the copyright revision movement in the past 20 years.

the Librarian, not the Register, who exercises the real authority or "executive power" in refusing registration. Reg. Br. 61. This assumption, however, conflicts with the Register's own actions in rejecting typeface designs during the period from 1914 to 1956 when there was no applicable regulation. It is thus clear that the Register, not the Librarian, has been exercising a broad authority or "executive power" to reject claims of copyright on typeface design.

Second, the Register assumes that she exercises no "executive power" because she does not "enforce" the Copyright Act. Reg. Br. 64-5. Yet, no executive agency, not even the Department of Justice, "enforces" its own determinations in the sense used by the Register. All executive agencies must resort to a court to enforce their decrees, orders or decisions. What the Register does is to grant or deny a copyright registration. If the registration is denied, the losing party has no protectable property rights in the claimed copyright since an infringement action cannot be maintained without a registration. 17 U.S.C. §13. Thus, the Copyright Office action in refusing a copyright certificate is no less an "executive" determination of personal property rights than the action of an executive or independent administrative or regulatory agency such as the FCC in denying a license, or the ICC or CAB in rejecting a rate increase. In either event, the losing party is

forced to seek a court reversal of the administrative agency's determination before there is a protectable property interest.

The Register argues that the Appointments Clause of the Constitution is satisfied because she is appointed by the Librarian who is the "head of a department." The foundation for the argument is the proposition that the mere appointment of the Librarian by the President with the advice and consent of the Senate provides a sufficient "connection" for the Librarian to qualify as "head of an executive department" as the term is used in the Appointments Clause. The defect in this argument is exposed by the fact that the Supreme Court and all other judges of the constitutional courts are appointed by the President, with the advice and consent of the Senate, but this does not make them part of the Executive Branch, much less "head of an executive department."

VI

AMICI'S BRIEF OFFERS NOTHING NEW

The amici brief offers nothing new, except extraneous matters which are irrelevant to this proceeding. Like the Copyright Office arguments, it seeks to legitimize an allegedly long standing, unchallenged practice of the Copyright Office, regardless of how incorrect or unfair it may be. Similarly, like the Register, the amici brief argues

that Eltra's typeface design is not a "work of art" by attacking the facts conceded by the Register.

The real thrust of the amici brief is that Eltra might abuse its copyright in a typeface design by making an illegal tie-in under the Antitrust Laws. Such an argument has no place in an action to compel registration provided for by the Statute. The misuse of a copyright or the violation of the Antitrust Laws would be a defense in an infringement action ("Nimmer on Copyright" §149.1), but it is premature here. Thus, Eltra cannot be presumed to violate the law if granted copyright registration.

Amici attempt to inject into the case the "ordinary observer" test as the standard for determining registrability. Its attempt is totally inappropriate and misleading. The "ordinary observer" test referred to on page 12 of amici's brief, as an adjunct to the "reasonable man" standard of liability, relates solely to a proceeding for copyright infringement. The inappropriateness of any "observer" test to registrability is demonstrated by the fact that the Copyright Office does not and cannot make comparisons between one design and another to determine differences or registrability.^{19/}

^{19/} The very regulations of the Copyright Office provide: "The Copyright Office, however, does not undertake the making of comparisons of copyright deposits to determine similarity between works. . .", §201.2 C.F.R., Title 17, Chapter 2.

The amici brief also has the same preoccupation as the Register with certain economic and philosophical views concerning the proper place for typeface protection and with the recent revision proceedings in Congress in 1975 and 1976. The difficulty is that these considerations are irrelevant to a determination whether Eltra's typeface design is registrable under the 1909 Act.^{20/}

VII

CONCLUSION

The Copyright Act of 1909 provides for the registration of "works of art," 17 U.S.C. §5(g). The District Court properly held that the ORION typeface design of Eltra is a "work of art," and that any interpretations of the two regulations cited by the Copyright Office in denying such registration were erroneous. The case should end at this point since the Statute mandates registration for the typeface design as a work of art.

The Copyright Office refused to register the ORION typeface design on the ground that it was not a "work of art." But the District Court below found to the contrary. Nevertheless, the District Court upheld the refusal of registration on the irrelevant and erroneous basis that there was some long standing practice of the Copyright Office

^{20/} The 1909 Act is still the law. The Copyright Revision Bill was signed by President Ford on October 19, 1976, but its provisions do not become effective until January 1, 1978, except for certain matters irrelevant to this case.

having Congressional acquiescence to deny registration of such designs. As demonstrated herein and in Eltra's main brief on appeal, there is no such long standing practice, and it can scarcely be characterized as having Congressional acquiescence.

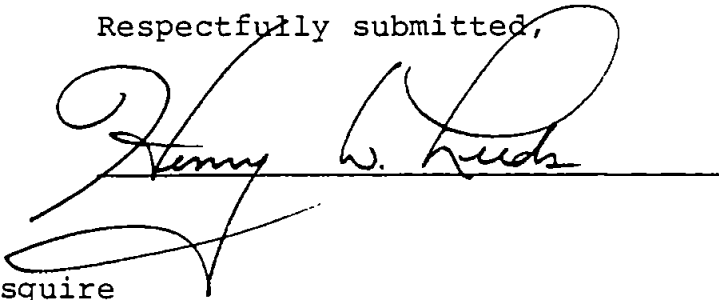
Even assuming the existence of a long standing practice as alleged by the Register, the Copyright Office cannot create an implied statute of limitations for challenging a right of registration that is provided for by Statute. Stated more succinctly, an agency action in violation of a statute can never become lawful, no matter how long standing.

The Register in this case has exercised significant authority by interpreting the Copyright Statute to deny registration of typeface designs without any explicit authority in the Statute or case law. If this Court considers such exercise relevant, it must also decide whether the exercise exceeded the ministerial powers of the Register under the Statute and whether it was a violation of the Appointments Clause and the Separation of Powers Doctrine. The decision cannot be on the basis of philosophy or economics affecting typeface design, the 1976 Copyright Statute (Reg. Br. 20-24), Congressional inaction (Reg. Br. 24-27) or any unpublished, sporadic or inconsistent administrative actions of the Copyright Office (Reg. Br. 27-39).

It is respectfully urged that this Court has a duty to

render an independent determination on the issues raised in this appeal. It can discharge this duty, without venturing into the legal quicksand of constitutionality or setting limits on the Register's statutory authority, simply by accepting the well-supported finding of the District Court that Eltra's ORION typeface design is a "work of art" and, therefore, entitled to registration under the Statute.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Henry W. Leeds", is written over a horizontal line. The signature is fluid and cursive, with a large initial "H" and a long, sweeping underline.

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CERTIFICATE OF SERVICE

In compliance with Rule 25(a) of the Federal Rules of Appellate Procedure, it is hereby certified that twenty-five (25) copies of the Reply Brief of Appellant, Eltra Corporation, were filed by depositing them in the mail, first class postage prepaid, addressed to William K. Slate, II, Clerk, United States Court of Appeals, Fourth Circuit, Tenth and Main Streets, Richmond, Virginia 23219; that two (2) copies of said Reply Brief were served on counsel for Appellee, Barbara A. Ringer, by first class mail, postage prepaid, addressed to Jon A. Baumgarten, Esquire, General Counsel, United States Copyright Office, Library of Congress, Washington, D. C. 20559 and James H. Simmonds, Esquire, 15th Street & North Courthouse Road, Arlington, Virginia 22201; and that two (2) copies of said Reply Brief were served on counsel for Amici, by first class mail, postage prepaid, addressed to Hazel, Beckhorn & Hanes, P. O. Box 547, Fairfax, Virginia 22030 and Cowan, Liebowitz & Latman, P.C., 200 East 42nd Street, New York, New York 10017, all this 21st day of April, 1977.

J. Michael Cleary